

1 Carissa Phelps (Cal. Bar No. 264044)
cphelps@levinlaw.com
2 Kathryn L. Avila (*pro hac vice*)
kavila@levinlaw.com
3 Kimberly R. Lambert Adams (*pro hac vice*)
kadams@levinlaw.com
4 LEVIN, PAPANTONIO, THOMAS,
MITCHELL, RAFFERY & PROCTOR, P.A.
5 316 S. Baylen Street, Suite 600
Pensacola, Florida 32502
6 Telephone: 850-435-7153
Facsimile: 850-436-6153

7 Kelly M. Dermody (Cal. Bar No. 171716)
8 kdermody@lchb.com
9 Michelle A. Lamy (Cal. Bar No. 308174)
10 mlamy@lchb.com
11 LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
Telephone: 415-956-1000
Facsimile: 415-956-1008

[Additional Counsel on Signature Page]

Attorneys for Plaintiff J.B.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

19 || J.B.,

Case No. 4:19-cv-07848-HSG

20 Plaintiff,

**PLAINTIFF J.B.'S MOTION FOR LEAVE
TO FILE A MOTION FOR
RECONSIDERATION**

21 ||| v.

22 || G6 HOSPITALITY, LLC, *et al.*,

Judge: Hon. Haywood S. Gilliam, Jr.

23 || Defendant(s).

MOTION AND MEMORANDUM IN SUPPORT

I. INTRODUCTION

Pursuant to Local Rule 7-9(a), Plaintiff respectfully moves for leave to file a motion for reconsideration of the Court’s August 20, 2020 Order Granting Motions to Dismiss. ECF No. 132 (“Order”). Specifically, Plaintiff seeks reconsideration of the portion of the Order finding that Defendant Craigslist qualifies for immunity under Communications Decency Act Section 230(c) and dismissing Plaintiff’s state law claims against Craigslist without leave to amend. Order at 6-11. Reconsideration briefing is warranted for at least two reasons.

First, the Supreme Court recently confirmed that the originally intended scope of Section 230 is “a far cry from what has prevailed in court,” and implored lower courts to stop “reading extra immunity into statutes where it does not belong.” *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, No. 19-1284, 2020 WL 6037214, at *2 (Oct. 13, 2020). The *Malwarebytes* guidance is particularly applicable here, because Justice Thomas specifically noted a case that is materially similar to this one as a problematic extension of Section 230 immunity. *Id.* at *4.

Second, this Court issued the Order without fulsome briefing and then dismissed Plaintiff’s state law claims without leave to amend, meaning the Court has not yet considered whether the allegations in Plaintiff’s First Amended Complaint (“FAC”) are sufficient to warrant discovery on whether Craigslist was, in fact, an “information content provider” within the meaning of Section 230. The only court to consider whether Section 230 immunity applies to Craigslist’s sex trafficking content on a full record concluded (after this challenged Order was issued) that Craigslist was plausibly “a content creator and not merely a publisher of third-party content,” and therefore not immune from either state or federal anti-trafficking claims on a motion to dismiss. *M.L. v. craigslist Inc.*, No. C19-6153 BHS-TLF, 2020 WL 5494903, at *4 (W.D. Wash. Sept. 11, 2020).

Accordingly, Plaintiff respectfully requests that the Court grant this motion for leave and permit Plaintiff to file a motion for reconsideration, through which the parties can fully brief this issue in light of recent authority and Plaintiff's amended factual allegations.

1 **II. BACKGROUND**

2 On August 20, 2020, the Court granted Craigslist's motion to dismiss Plaintiff's state and
 3 federal sex trafficking claims, as alleged in Plaintiff's original complaint. Order at 11, 15. With
 4 respect to Plaintiff's state law claims (the subject of this motion for leave), the Court first
 5 determined that Craigslist satisfied the three-prong test for immunity set forth in *Dyroff v.*
 6 *Ultimate Software Grp., Inc.*, 934 F.3d 1093 (9th Cir. 2019), *id.* at 5-6, and then determined that
 7 Craigslist was not "an information content provider" within the meaning of Section 230(f), *id.* at
 8 10-11.¹ Regarding the question of content creation, the Court noted that "Plaintiff has pled no
 9 facts to support this argument," but nevertheless dismissed Plaintiff's state law claims without
 10 granting leave to amend her complaint with further factual support for this argument. *Id.* at 11.

11 On September 17, 2020, Plaintiff filed the operative FAC pursuant to the Court's order
 12 granting Plaintiff leave to re-plead her federal sex-trafficking claims against Craigslist, and
 13 federal and state sex-trafficking claims against the Hotel Defendants. Order at 18-19. As
 14 relevant here, the FAC includes new factual allegations regarding Craigslist's creation,
 15 maintenance, and protection of the sex-trafficking content on its platform. FAC ¶¶ 40-45.
 16 Among other things, Plaintiff now alleges that Craigslist intentionally designed its "Erotic" and
 17 "Adult" services categories to make advertisements for commercial sex as easy to locate as
 18 possible, including by developing an interface, button selections (such as "w4m" meaning
 19 "woman for man"), search feature (where one could enter terms such as "young and fresh,"
 20 "virgin," "new girl," and "new to Craigslist," which were code for "minor"), and photo upload
 21 feature (permitting a specific number of photographs to appear per sexual advertisement), that
 22 invited buyers of commercial sex to locate victims on the platform. *Id.* ¶¶ 41-42. Plaintiff also
 23 alleges that in response to pressure from law enforcement, Craigslist renamed this platform
 24 several times, but otherwise refused to take any steps to identify, reduce, or eliminate sex-

25

 1 ¹ The Court also concluded that state civil anti-trafficking claims are not exempted from Section
 2 230 immunity under Section 230(e), pursuant to the Fight Online Sex Trafficking Act
 3 ("FOSTA"). Order at 6-10. While Plaintiff respectfully disagrees with the Court's analysis,
 4 Plaintiff does not seek leave to file a motion for reconsideration of that portion of the Court's
 5 ruling, as the post-Order legal authority and factual allegations bear only upon whether Section
 6 230 immunity applies to Craigslist at all (*i.e.*, not to the question of FOSTA exemption).

1 trafficking on the platform. *Id.* ¶¶ 43-44. Advocacy groups referred to these as “cosmetic
 2 changes” that illustrated Craigslist was not at all “outraged and disturbed that their site is the
 3 primary way children are bought in the country.” *Id.*

4 To the contrary, Craigslist took steps to *protect* the “Erotic” and “Adult” categories from
 5 outside interference—be it from law enforcement or competitors. FAC ¶ 44. For example,
 6 Craigslist protected the anonymity of the traffickers by permitting commercial sex sellers and
 7 buyers to communicate anonymously within the Craigslist system. *Id.* Because Craigslist
 8 controlled this communication system, the identities of victims and purchasers were hidden not
 9 only from public view, but also from law enforcement and other agencies who were working to
 10 locate children being sold *specifically on* Craigslist. *Id.* Craigslist certainly had the ability to
 11 identify and monitor users of the “Erotic” and “Adult” categories if it wanted to; it only did so,
 12 however, when it suited Craigslist’s business interests. For example, Craigslist blocked access to
 13 a visual search company called Listpic, in part because of the other company’s attempt to pull and
 14 organize the images posted on the “Erotic Services” section. *Id.* In other words, Craigslist not
 15 only hosted this content, Craigslist actively protected it.

16 Plaintiff also now alleges that Craigslist repeatedly fought to own and control the content
 17 of the advertisements—including those for sex—that appeared on its platform. FAC ¶ 45.
 18 During the years Plaintiff was trafficked on the Craigslist platform, Craigslist “repeatedly stifled
 19 other web developers’ efforts to build on top of its data” with the purpose of “keeping online ads
 20 available *only* on its website.” *Id.* And in 2012, Craigslist went so far as to bring copyright
 21 infringement claims over the advertisements posted on its website, asserting its ownership over
 22 the content and undercutting any claim that Craigslist was merely a host for this material. *Id.*

23 These efforts were successful: in 2010 alone, Craigslist derived an estimated \$36 million
 24 in revenue on sex trafficking advertisements, which drove a 22 percent increase in Craigslist’s
 25 overall revenues between 2009 and 2010. FAC ¶ 45. It is unsurprising, then, that Craigslist was
 26 publicly identified that same year—one of the years Plaintiff was trafficked on Craigslist—as “the
 27 Wal-Mart for sex trafficking and crimes, where the majority of online ads are placed for
 28 prostitution of women and children.” *Id.* ¶ 35.

1 **III. LEGAL STANDARD**

2 Local Rule 7-9(b) authorizes a party to seek reconsideration on any of the following
 3 bases:

4 (1) That at the time of the motion for leave, a material difference in
 5 fact or law exists from that which was presented to the Court
 6 before entry of the interlocutory order for which reconsideration is
 7 sought. The party also must show that in the exercise of reasonable
 8 diligence the party applying for reconsideration did not know such
 9 fact or law at the time of the interlocutory order; or
 10 (2) The emergence of new material facts or a change of law
 11 occurring after the time of such order; or
 12 (3) A manifest failure by the Court to consider material facts or
 13 dispositive legal arguments which were presented to the Court
 14 before such interlocutory order.

15 Additionally, “[a] district court may reconsider and reverse a previous interlocutory
 16 decision for any reason it deems sufficient, even in the absence of new evidence or an intervening
 17 change in or clarification of controlling law.” *In re Intuitive Surgical Sec. Litig.*, No. 13-01920,
 18 2014 WL 7146215, at *2 (N.D. Cal. Dec. 15, 2014) (quoting *Abada v. Charles Schwab & Co., Inc.*, 127 F. Supp. 2d 1101, 1102 (S.D. Cal. 2000)). *See also City of L.A. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (“As long as a district court has jurisdiction over
 19 the case, then it possesses the inherent procedural power to reconsider . . . or modify an
 20 interlocutory order for cause seen by it to be sufficient.”) (quoting *Melancon v. Texaco, Inc.*, 659
 21 F.2d 551, 553 (5th Cir.1981)); *City of San Jose v. Monsanto Co.*, No. 5:15-CV-03178-EJD, 2017
 22 WL 6039670, at *1 (N.D. Cal. Dec. 6, 2017) (noting that if a party “disagree[s] with the Court’s
 23 application of the law to the facts, the proper vehicle is a motion for reconsideration”).

24 **IV. ARGUMENT**

25 Very recent authority from the Supreme Court supports the conclusion that Section 230
 26 immunity does not apply to Craigslist here. Recent lower court authority *specifically regarding*
 27 *Craigslist* likewise confirms that, were the Court to accept full briefing and consider Plaintiff’s
 28 amended allegations, it should determine that immunity is inappropriate here.

29 In *Malwarebytes*, issued less than one month ago, Justice Thomas cautioned lower courts
 30 to stop relying on Section 230 to grant website companies broad immunity from liability for

1 unlawful conduct occurring on their platforms. Justice Thomas explained that Section 230 was
 2 enacted “against specific background legal principles,” including laws distinguishing between
 3 “publishers or speakers (like newspapers) and distributors (like newsstands and libraries).” 2020
 4 WL 6037214, at *1. Specifically, Section 230 was intended to clarify “that if a company
 5 unknowingly leaves up illegal third-party content, it is protected from publisher liability by
 6 §230(c)(1); and if it takes down certain third-party content in good faith, it is protected by
 7 §230(c)(2)(A).” *Id.* at *2.²

8 Unfortunately, this “modest understanding is a far cry from what has prevailed in court,”
 9 because lower courts have read “extra immunity” into Section 230 “where it does not belong.”
 10 2020 WL 6037214, at *2. Justice Thomas specifically noted a case quite similar to this one—
 11 where the company “tailored its posting requirements to make sex trafficking easier, accepted
 12 anonymous payments, failed to verify e-mails, and stripped metadata from photographs to make
 13 crimes harder to track”—as a problematic extension of Section 230 immunity. *Id.* at *4 (internal
 14 quotation marks omitted). Here, Plaintiff offers materially identical allegations, including that,
 15 “Craigslist designed its platform to make advertisements for commercial sex as easy to locate as
 16 possible,” FAC ¶ 41, “protected the anonymity of the traffickers by permitting commercial sex
 17 sellers and buyers to communicate anonymously within the Craigslist system,” *id.* ¶ 44, and hid
 18 “the location and identities of victims and purchasers . . . not only from public view, but also from
 19 law enforcement and other agencies who were working to prevent and eliminate sex trafficking,”
 20 *id.* In addition, Craigslist did *even more*, here, to assert control over the content on its platform
 21 than in the case to which Justice Thomas referred: Craigslist also *actively fought* to own the
 22 content of the advertisements on its platform, including those for sex, through blocking access to

23 ² Justice Thomas is correct: the original purpose of Section 230 was to *incentivize* internet
 24 companies to play an active role preventing the sexual exploitation of children, not to *immunize*
 25 them for a failure to do so. Section 230 was enacted as a “Good Samaritan” provision, to protect
 26 internet companies that “make a good faith effort to edit the smut from their systems.” 41 Cong.
 27 Rec. H8460, H8471-72 (1995). It was only ever intended to protect websites from defamation
 28 lawsuits simply for exercising editorial control over the content on their sites, and was indeed
 passed to address precisely those cases. *See* H.R. Rep. 104-458 (1996) (“One of the specific
 purposes of this section is to overrule . . . decisions which have treated such providers and users
 as publishers or speakers of content that is not their own because they have restricted access to
 objectionable material.”).

1 images on the “Erotic” services platform to a competitor image aggregator, and by suing for
 2 copyright infringement over the content of advertisements posted on its website. *Id.* ¶ 45.

3 To the extent this Court finds Justice Thomas’s warning instructive, then, it would be
 4 difficult to argue that it does not apply to this case. Here, as there, immunity should not apply
 5 because in each instance the plaintiff sought to hold the website to account for its “own
 6 misconduct.” 2020 WL 6037214, at *5. In fact, after this Court’s dismissal Order was issued,
 7 another court within this Circuit considered whether Craigslist exercised sufficient control over
 8 the sex-trafficking advertisements on its platform to fall outside the scope of Section 230
 9 immunity, and concluded that the plaintiff (a survivor) had alleged sufficient allegations to
 10 survive a motion to dismiss on this issue. In *M.L. v. craigslist Inc.*, the court concluded that the
 11 plaintiff had sufficiently alleged Craigslist is a “content provider” with respect to its sex
 12 trafficking categories, such that Craigslist could not assert Section 230 immunity on a motion to
 13 dismiss. No. C19-6153 BHS-TLF, 2020 WL 5494903, at *4 (W.D. Wash. Sept. 11, 2020). After
 14 an extensive discussion of the standard for Section 230 immunity, the court concluded that
 15 Section 230(c) does *not* bar state law claims against Craigslist because Craigslist “was a content
 16 creator and not merely a publisher of third-party content.” *Id.*

17 Here, reconsideration is warranted not only by this subsequent authority but also because
 18 the Court issued its dismissal Order without the benefit of robust briefing on this issue.³
 19 Moreover, despite concluding that Plaintiff “pled no facts to support” the argument that Craigslist
 20 does not satisfy the Section 230 immunity criteria, and despite granting Plaintiff leave to amend
 21 with respect to her federal claims against Craigslist, the Court nevertheless dismissed Plaintiff’s
 22 state law claims against Craigslist without leave to amend. Order at 11. But Plaintiff’s amended
 23 allegations extend far beyond those found to be sufficient in *M.L.*, and Plaintiff respectfully
 24 submits that the Court and parties would benefit from further briefing—through a motion for
 25 reconsideration—about how those allegations square with post-Order Supreme Court and lower

26 ³ See ECF No. 86 at 4, n.9 (Plaintiff stating that she “remains confident that Section 230
 27 immunity simply does not apply here,” but that if the Court were going to consider application of
 28 the Section 230 criteria at all, “then [she] respectfully requests an opportunity to provide more
 fulsome briefing on why the Section 230 criteria also are not met here”).

1 court authority as well as pre-Order Ninth Circuit authority on the scope of Section 230
2 immunity.

Finally, as Justice Thomas observed in *Malwarebytes*: “Paring back the sweeping immunity courts have read into §230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail.” 2020 WL 6037214, at *5. Plaintiff respectfully submits that the Court should at least entertain complete briefing on whether Plaintiff’s new allegations warrant *just discovery* into whether Craigslist can properly assert immunity here. *See M.L.*, 2020 WL 5494903, at *4 (granting plaintiff “the opportunity to conduct discovery as to whether craigslist did materially contribute to the unlawful third-party content” alleged in her complaint).

12 || V. CONCLUSION

13 For the foregoing reasons, Plaintiff respectfully requests that the Court grant this motion
14 for leave and permit Plaintiff to file a motion for reconsideration.

16 || Dated: November 9, 2020 Respectfully submitted,

By: /s/ *Kelly M. Dermody*

Kelly M. Dermody (Cal. Bar No. 171716)
kdermody@lchb.com
Michelle A. Lamy (Cal. Bar No. 308174)
mlamy@lchb.com
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
Telephone: 415-956-1000
Facsimile: 415-956-1008

Annika K. Martin (*pro hac vice*)
akmartin@lchb.com
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013
Telephone: 212-355-9500
Facsimile: 212-355-9592

1 Carissa Phelps (Cal. Bar No. 264044)
2 cphelps@levinlaw.com
3 Kathryn L. Avila (*pro hac vice*)
4 kavila@levinlaw.com
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6 kadams@levinlaw.com
7 LEVIN, PAPANTONIO, THOMAS,
8 MITCHELL, RAFFERY & PROCTOR, P.A.
9 316 S. Baylen Street, Suite 600
10 Pensacola, Florida 32502
11 Telephone: 850-435-7153
12 Facsimile: 850-436-6153

13 *Attorneys for Plaintiff J.B.*

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record who receives CM/ECF notification.

DATED this 9th day of November 2020. By: *s/ Kelly M. Dermody*
Kelly M. Dermody